

June 7, 2000

**OFFICE OF THE HEARING EXAMINER  
KING COUNTY, WASHINGTON**

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**REPORT AND DECISION**

**SUBJECT:** Department of Development and Environmental Services File No. **B99M3024**

**CHAMPAGNE POINT COMMUNITY BEACH DOCK**  
Threshold Determination Appeal

Location: Tract A Juanita Point Division 2 located on Northeast 112<sup>th</sup> Street

Applicant: Brian Kenworthy, *represented by*  
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Appellants: Mr. & Mrs. Richard M. Hunnex and Mr. & Mrs. Roger Lien, *represented by*  
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King County: Department of Development and Environmental Services, Land Use Services  
Division, *represented by*  
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**SUMMARY OF RECOMMENDATIONS:**

Department's Preliminary Recommendation:  
Department's Final Recommendation:

Deny appeal  
Deny appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	May 17, 2000
Hearing Closed:	May 24, 2000

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Traffic
- Parking
- Fisheries
- Sanitation
- Zoning code compliance

SUMMARY:

Denies SEPA threshold determination appeal regarding 600 square foot community beach dock.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1.     **Proposal.** Brian Kenworthy, acting on behalf of 22 owners having an undivided shoreline interest in the subject community beach property (the "Applicant")<sup>1</sup>, proposed to remove an existing non-conforming community pier and boat lift and to construct a new 600 square foot community pier. The proposed structure, 80 feet long by 7 ½ feet wide, would comprise 600 square feet. The proposed facility would be used by the same 22 property owners already having an undivided shoreline interest in the property. The present dock and boat lift do not conform to the side yard setback requirements of the zoning classification and shoreline management master program.
  
2.     **Mitigated Determination of Non-Significance (MDNS).** On November 19, 1999, the King County Department of Development and Environmental Services ("DDES" or the "Department") issued a Mitigated Determination of Non-Significance for the subject project pursuant to the

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<sup>1</sup> Counsel to the Appellants has suggested that perhaps Mr. Kenworthy has not been properly assigned or delegated the authority to act upon behalf of the 22 property owners. However, this point has not been argued by the parties. No motion has been offered regarding this assertion. Consequently, this report and decision accepts the Department of Development and Environmental Services apparent conclusion that Mr. Kenworthy has authority to act as agent for, or otherwise to act on behalf of, the 22 Champagne Point Community Beach property owners.

State Environmental Policy Act. That is, the Department issued its determination that the proposed project would not cause a probable significant adverse impact upon the environment, provided that certain mitigating measures were implemented. This determination means that no Environmental Impact Statement (EIS) would be required so long as the various mitigating measures remain a part of the project. The Applicant incorporates as part of its proposal the following mitigating measures:

- Incorporate light prisms for at least 50% light passage through surfacing;
- Use narrow diameter steel piles;
- Space piles at least 18 feet apart.

In addition, the Department requires that the following mitigating measures “shall be required prior to permit issuance”:

- A revised site plan shall be prepared incorporating the mitigating design factors described above;
- The Applicant shall post a permanent sign visible to the authorized users informing them of the restriction imposed by “Condition No. 6 of the Shoreline Exemption L98SX146.” The size and location of the sign must be approved by the Department.

Condition No. 6 of Shoreline Exemption L98SX146 requires the following:

Permanent moorage (more than 72 hours) is restricted solely to boats owned by authorized property owners with legally authorized interest in the subject property by virtue of rights obtained by purchase of recognized residential property to which the subject community lot is attached. Through the building permit process, a map shall be provided identifying the residential lots having an attached interest in the subject community lot together with the names of said residential lot owners, date of lot creation, date of lot acquisition, and number and size of boats to be moored at the subject pier.

Further, as a result of the appeal hearing review on this matter, the Applicant agrees to the following additional mitigating measures:

- To provide parking volunteered by a neighboring property owner. The Appellant challenges the feasibility of this measure. See Finding No. 5, below.
- To post good neighbor rules for use of the community beach and dock.

3. **Appeal Filed.** On December 20, 1999, the Examiner’s Office received notice from the Department that Mr. & Mrs. Richard M. Hunnex and Mr. & Mrs. Roger Lien (individually and collectively, the “Appellants”) filed appeal from the Department’s threshold determination. Issues raised by the Appellants may be listed briefly as follows:

- a. Impacts upon aesthetics and views;
- b. Increased use of the property, it is argued, will affect most of the other appeal points listed here.
- c. Increased traffic and parking in the neighborhood resulting in traffic circulation/safety problems.

- d. Increased boat emissions, wave action and noise.
- e. Impacts from lack of a sanitation facility.
- f. Inadequate SEPA review due to improper shoreline exemption decision.
- g. Impact on fisheries resources.
- h. Probability that mitigating measures will not be effectively implemented or maintained due to an alleged lack of identifiable responsible property ownership.

No lighting fixtures are proposed. Therefore, the appeal of “potential future light and glare” is not reviewed below. “Code violations” are not shown in the Applicant’s drawings. The Department has indicated that no building permit will be issued for any proposed development which violates code requirements. This issue, raised by the Appellants, therefore will be given minimal review below. At the pre-hearing conference, the Examiner excluded “code enforcement history” as not being relevant to the threshold determination appeal review.

4. **Applicant’s Continuing Objection.** The Applicant objects to the Examiner’s acceptance of evidence and arguments related to the Department’s decision to exempt the Champagne Point community dock from a shoreline management (substantial development) permit requirement. The Examiner, DDES and the Appellants all agree with the Applicant’s assertion that the Examiner has no jurisdiction to consider the Department’s shoreline exemption. The Examiner ruled that he had no jurisdiction to consider whether to require the Department to change its shoreline exemption decision. However, the Examiner ruled that the decision to exempt the project from a shoreline management permit review was most certainly relevant to whether the Department’s SEPA threshold determination decision was based upon adequate information. Specifically, the Examiner indicated that:

While the Examiner does not have the authority to overturn the shoreline exemption, the Examiner may be able to determine whether the responsible official should have considered other factors in making the threshold determination. The Appellants have the right to argue the impact of the requirement of a substantial development permit on the decision that the responsible official may have or should have made. In short, the responsible official relied on and incorporated the exemption into the threshold determination. If the exemption was improperly granted, that renders the threshold determination suspect, and that is the issue to be reviewed here.

The Examiner denied the motion to exclude shoreline exemption per se, but allowed evidence and discussion subject to the limitations indicated above. The Applicant objects, arguing that—regardless of whether argument and evidence regarding the appropriateness of the shoreline management exemption might illuminate understanding of the adequacy of SEPA threshold determination information—all such evidence and argument should be excluded from the hearing record because the Examiner has no jurisdiction to overturn the shoreline management exemption decision. First decided pursuant to the Department’s motion in pre-hearing conference, then decided again in hearing pursuant to the Applicant’s motion, the Examiner’s decision remains unchanged.

5. **Traffic and Parking Conditions.** The community beach property provides no appropriate parking for vehicles. Access to the property is obtained by a narrow steep road with a hairpin turn located immediately adjacent to the property. Narrow steep shoulders provide scant reasonable parking opportunity. Thus, parking vehicles along that road creates a traffic hazard. Applicant Kenworthy testifies that a neighboring property owner has offered a parking area on her property to accommodate the Champagne Point homeowners recreational parking needs. No formal documents have been effected, however. The Appellant has suggested, but has not shown, that this neighboring property owner intends to sell.
6. **Sanitation.** Appellant Hunnex indicates that he has seen users of the Champagne Point community beach property urinate upon the land and upon the lake (from boats having just used the same property). Counsel's argument suggests human defecation on the property has also occurred, however the hearing record contains no credible evidence to that effect. The Appellants assert that the issue of sanitation is two-fold: not only for users of the dock and property, but also for the vessels to moor at the proposed dock. The Appellant contends that these issues have not been adequately addressed. The Applicant responds that an informal poll of the community beach owners indicates no awareness of such "antisocial" behavior. The Applicant is willing to post a sign on the property indicating appropriate rules of use. However, the Applicant and the Department agree that both the County and the homeowners are unlikely to successfully regulate "boorish behavior." The hearing record contains some discussion regarding the provision of lavatory facilities. The Department's representative testifies that temporary lavatory facilities (referred to in this hearing record as "Sani-Kans," a brand name), cannot be placed upon a residential property except for the temporary purpose of supporting construction activities. Further, a permanent lavatory cannot be placed upon a residentially classified property, the Department's representative testifies, because the zoning code prohibits the placement of an "accessory use" in the absence of a "primary use." The hearing record contains no testimony, evidence or argument that authoritatively disputes this testimony.
7. **Side Yard Encroachment.** Past usage of the subject property indicates that small boats and related recreational items are occasionally stored within the side yard area along the property line. The adverse impact resulting from this use of the property is unclear. Further, it is unclear whether such non-structural use of the side yard area is actually prohibited.

Side yard encroachment also becomes an off-shore issue, potentially affecting the southerly abutting property owner and Appellant, Mr. & Mrs. Lien. Their own dock is located at the property line along the north side of their property. Due to shoreline bathymetry, they are unable to use the south side of their dock for moorage purposes. It is possible that the proposed Champagne Point Community Dock could obstruct access to the north side of the existing Lien dock. This would be particularly true if the boat lift proposed by Champagne Point is located on the south side of the proposed dock as indicated in the Applicant's drawings.

The relative uncertainty in the preceding paragraph comes from uncertainty regarding the Applicant's drawings. The hearing record contains insufficient information to determine the actual boundaries of the Champagne Point community beach property. Some evidence suggests that the property is substantially more narrow than indicated in the application drawings. If that information proves to be true, then the obstruction to Lien dock access and the alleged side yard encroachment by the proposed dock would indeed occur in the absence of code compliance. The Lien dock, located at the property line, is a non-conforming structure.

The Department argues that code compliance will necessarily be imposed as a result of building permit review; that the required side yard or set back will be imposed as a condition of development. However, the information available thus far does not appear to contribute meaningfully to an understanding of the actual community beach lot dimensions. The Department's representative could not with confidence say whether a survey would be required or whether the building permit plans examiner would require any other measurement verification to determine the feasibility of constructing the proposed community dock within the regulatory confines available.

8. **Fisheries.** The Washington State Department of Fisheries has issued "Hydraulics Project Approval" (HPA) for the proposed community dock. That approval is based upon the various mitigating measures described in Finding No. 2, above. The 50% light passage requirement and, the reduced number of pilings, in particular, are required in order to manage probable fisheries impacts. The hearing record contains the testimony of a Department of Fisheries area biologist who expresses concern regarding the cumulative impact of residential dock approvals upon fisheries shoreline habitat. That same area biologist signed the HPA for this project, indicating compliance with Department of Fisheries standards. A fisheries biologist retained by the Applicant testifies that groomed urban shoreline actually diminishes the amount of near-shore shade from natural conditions *unless* some shade is provided—for instance, by docks. Photographs contained in the hearing record depicting nearby natural shoreline conditions illustrate this point. Both biologists agree that the proposed development will not impose a "significant unmitigated adverse impact" upon the environment.
9. **Increased Use.** Twenty-two Champagne Point lot owners own joint undivided interest in the subject property. Approximately 6 of them own boats. The hearing record provides no basis to find that any number of them are going to suddenly buy boats, thereby substantially increasing the boat ownership of the community, once the dock is approved. Presently, only 1 or 2 boats may use the existing non-conforming dock. Only one side of the existing dock is accessible by boat, due to shoreline accretion resulting from a poorly maintained drainage outlet on the Champagne Point community beach property. The Appellants argue that construction of the proposed dock will increase use of the property to an extent and degree that will constitute a significant adverse impact upon the environment—if not in-and-of itself, then due to the traffic/parking congestion discussed in Finding No. 5, above; sanitation, discussed in Finding No. 6; noise; air and water emissions.
10. **Context.** The subject property and neighboring properties are classified residential R-6-P (6 dwelling units per acre). The shoreline master program allocates the shorelines of King County into 4 use categories—Natural, Conservancy, Rural and Urban. The subject property and neighboring properties are located in the most intensive of these 4 categories, Urban. The community beach Applicant proposes a dock approximately the same size as that owned by Appellant Hunnex. As many as 5 water craft may be moored at the Hunnex dock on a given day depending upon the presence of guests. Such an intensity of dock use could be achieved by the Champagne Point community beach owners if 5 of the 6 Champagne Point boat owners—83%--all decided to moor their boats at the new dock at the same time.

The surrounding shoreline is developed with numerous residences having docks and bulkheads. From the photographic evidence of record, it appears that those docks do not meet the light prism standard to be required of the instant Applicant.

The photographic evidence indicates numerous other docks in the vicinity, some sized comparably to the proposed dock (including that of Appellant and abutting neighbor Hunnex).

11. **Adequate Information.** The Appellant charges that the Department has failed to acquire or consider adequate information on which to base a threshold determination with regard to the following areas of concern: increased use, affecting particularly traffic and parking congestion (Finding No. 5, above); lot dimensions, affecting the feasibility of dock placement without blocking access to the Lein dock (Finding No. 7, above). In addition, the Appellant argues that a higher standard of environmental review would have resulted if a shoreline substantial development permit had been required. This argument is based upon the allegation that the Department improperly issued an exemption from the substantial development permit requirements of the Shoreline Management Act. By the kindest assessment, one finds that the cost of the proposed dock is on the “cusp” of the \$10,000 construction value exemption limit. The cost determination, slightly under \$10,000, does not take into consideration the cost of a replacement boat lift or the cost of moving the existing lift. However, even if we find that exemption limit was exceeded and that a substantial development permit should have been required, we must also consider whether that would have affected the threshold determination. The Shoreline Management Administrator for the Department, Mr. Mitchell, testified that it would make no difference, that the same rules—for instance, for fisheries habitat protection—would apply. The Appellant contends that this is merely speculation on Mr. Mitchell’s part.

Finally, the Appellant argues that Endangered Species Act (ESA) new application to salmon fisheries indicates a requisite higher standard of review for proposed shoreline developments. The testimony of record suggests that no new review standards have been applied to shoreline development since some salmon species have been added to the ESA threatened species list.

12. Any portion of any of the following conclusions that may be construed as a finding is incorporated here by this reference.

#### CONCLUSIONS:

1. Any portion of any of the above findings that may be construed as a conclusion is incorporated here by this reference.
2. Section D of the Division’s (date) preliminary report to the King County Hearing Examiner (exhibit no. 2) cites the scope and standard of review to be considered by the Examiner. The Division’s summary is correct and will be used here. In addition, the following review standards apply:
  - a. WAC 197-11-350(1), -330(1)(c), and -660(1)(3). Each authorize the lead agency (in this case, the Environmental Division), when making threshold determinations, to consider mitigating measures that the agency or applicant will implement or mitigating measures which other agencies (whether local, state or federal) would require and enforce for mitigation of an identified significant impact.

b. RCW 43.21C.075(3)(d) and KCC 20.44.120 each require that the decision of the Responsible Official shall be entitled to “substantial weight”. Having reviewed this “substantial weight” rule, the Washington Supreme Court in Norway Hill Preservation Association v. King County, 87 Wn 2d 267 (1976), determined that the standard of review of any agency “negative threshold determination” is whether the action is “clearly erroneous”. Consequently, the administrative decision should be modified or reversed if it is:

...clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order.

3. As noted in Conclusion No. 2, above, the burden of proof falls on the Appellant in a threshold determination appeal. Considering the preponderance of the evidence, the Appellant has not successfully borne that burden in this case. Considering the above findings of fact and the entire hearing record, it must be concluded that the Department’s threshold determination in this matter is not clearly erroneous and therefore cannot be reversed.

The presentation of issues, questions and concerns is not sufficient to overturn a threshold determination. Rather, the determination (and the appeal review of that determination) must be based upon the preponderance of the evidence. The preponderance of the evidence in this case supports the Department’s determination.

4. Some of issues raised by the Appellant are valid reasons for concern. See Conclusion No. 4. However, they do not approach the magnitude requisite for a determination of significance.
5. In addition, the following conclusions apply:

- a. The record suggests but does not confirm, that the Department indeed erred in its issuance of shoreline exemption. The costs of this project, including measures to mitigate impacts (see particularly the order that follows below), probably exceed the \$10,000 threshold. This conclusion has no regulatory significance, however, for the following reasons:
  - As ruled in pre-hearing conference, the shoreline exemption decision cannot be altered by the Examiner—due to lack of jurisdiction.
  - As stated in Conclusion No. 4, above, the concerns of the Appellant do not approach the magnitude requisite for a determination of significance.
- b. Although the Appellant argues that the information on which the Department based its determination was insufficient, there is no adequate demonstration that the information on which the Division based its determination is actually erroneous, except as discussed in Conclusion No. 4.a., preceeding.
- c. There is a substantial amount of information in the record regarding the various impacts which have been asserted by the Appellant. The Department has not been unaware of these issues and has investigated (and reinvestigated) them, but has arrived at conclusions which differ from the Appellant’s. The Department, having had access to the variety of issues and points of view and information expressed by



the Appellant and others, maintains its original determination of non-significance. The Department's judgement in this case must be given substantial weight.

- d. In view of the entire record as submitted and in view of the State Environmental Policy Act, the Department's decision is not clearly erroneous and is supported by the evidence.
6. WAC 197-11-794 describes "significant" as meaning a "reasonable likelihood of more than a moderate adverse impact" on environmental quality, WAC 197-11-794 also provides the following guidance with respect to determining "significance":

Significant involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact. The severity of an impact should be weighed along with the likelihood of its occurrence.

In this case the proposed development is fundamentally no different from the existing context. A dock will be replaced with a dock. The proposed dock will be no larger nor will have capacity substantially different from the Appellants' neighboring dock. The existing multi-family use of the community beach dock will remain unchanged. There is no indication in the record that the existing number of boat owners within the 22 community beach member families will increase from the present number of approximately 6.

7. KCC 20.44.080.C states, in part:

Within the Urban Growth Boundary, substantive SEPA authority to condition or deny new development proposals or other actions shall be used only in cases where specific adverse environmental impacts are not addressed by regulations as set forth below or unusual circumstances exist. In virtually all of the areas of impact, except sanitation and traffic/parking, existing regulations address and mitigate probable impacts. In the case of fisheries, impacts will be mitigated in a manner superior to surrounding developments, providing a mixture of shade and light comparable to natural conditions. See Finding No. 8 and testimony of Mark Pedersen.

- a. The unusual circumstances standard clearly applies to the traffic and parking situation. The narrowness of the road, the hairpin turn, the narrowness and steepness of shoulders and the lack of formal parking stalls conspire to create a hazardous condition that will be exacerbated by renewed community use resulting from the proposed dock project. This adverse impact requires mitigation.
- b. In the case of sanitary facilities, considering Finding No. 7, above, the conclusion is obvious: an Applicant cannot be required to do what the Applicant cannot do. Further, the impact feared is unlikely to occur at a scale sufficient to warrant a determination of significance.

## DECISION:

The appeal is DENIED, except as indicated by the following order.

## ORDER:

The Department's MDNS is AMENDED by adding the following:

The community beach property shall be developed, concurrent with community dock redevelopment, with the same number of off-street parking spaces as would be required for a single-family residence, to be improved consistent with applicable County standard.

In all other respects the Department's MDNS is SUSTAINED unchanged.

ORDERED this 7<sup>th</sup> day of June, 2000.

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R. S. Titus, Deputy  
King County Hearing Examiner

TRANSMITTED this 7<sup>th</sup> day of June, 2000, to the following parties and interested persons:

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MINUTES OF THE MAY 17 AND 24, 2000 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. B99M3024 – CHAMPAGNE POINT:

R. S. Titus was the Hearing Examiner in this matter. Participating in the hearing and representing the Department was Fereshteh Dehkordi. Participating in the hearing and representing the Appellant was James Fitzgerald. Participating in the hearing and representing the Applicant was Dennis Reynolds. Other participants in this hearing were Richard Hunnex, Mark G. Pedersen, Larry Fisher and Mark Mitchell.

**The following exhibits were offered and entered into the record by the Department on May 17, 2000:**

Exhibit No. 1	DDES/LUSD Report to the Hearing Examiner, dated March 1, 2000
Exhibit No. 2	MDNS, issued November 19, 1999
Exhibit No. 3	Notice of correction, dated December 1, 1999
Exhibit No. 4	Environmental Checklist, dated May 5, 1999
Exhibit No. 5	Appeal of MDNS received, December 13, 1999
Exhibit No. 6	Site Plan, received November 9, 1999
Exhibit No. 7	Examiner's report and decision on Andermo Pier dated September 30, 1994 for File Nos. L93SH169, L93SH170 & E94E0610
Exhibit No. 8	Sockeye Spawning Habitat Map
Exhibit No. 9	List of property owners with interests in the community tract
Exhibit No. 10	Neighboring map showing the properties with interests in the community tract
Exhibit No. 11	Shoreline Exemption decision issued April 29, 1999
Exhibit No. 12	GIS vicinity map
Exhibit No. 13	SEPA file

**The following exhibits were offered and entered into the record by the Appellants on May 17, 2000:**

Exhibit No. 14	Series of photographs, 14A-14Y
Exhibit No. 15	Series of letters (four total), dated 1994-1995
Exhibit No. 16	Declaration of Mary Lien
Exhibit No. 17	Letter to Mark Mitchell of DDES from Brian Kenworthy with notations and 2 attachments, dated February 11, 1999.
Exhibit No. 18	<i>Excluded</i>
Exhibit No. 19	<i>Excluded</i>
Exhibit No. 20	Excerpt from SEPA file, highlighted in yellow
Exhibit No. 21	Exhibit No. 20, as annotated by Mr. Hunnex
Exhibit No. 22	NMMA description of boat lift
Exhibit No. 23	Series of letters from neighboring property owners.
Exhibit No. 24	<i>Excluded</i>

**The following exhibits were offered and entered into the record by the Applicant on May 17, 2000:**

Exhibit No. 25	Series of photographs, 25A-25D
Exhibit No. 26	Photograph of a 53-foot Defever boat
Exhibit No. 27	Shapiro report, written by Mark Pedersen, dated April 28, 2000

**The following exhibits were offered and entered into the record by the Appellants on May 17, 2000:**

Exhibit No. 28	Letter from Brian Kenworthy to Mark Mitchell, dated October 30, 1998, with attachments, <i>excluding</i> pages containing 2 notices of violations.
Exhibit No. 29	Letter to Brian Kenworthy from Mark Mitchell, dated December 15, 1998
Exhibit No. 30	Copy of building permit, dated
Exhibit No. 31	Copy of Seattle Times article about docks, March 13, 2000
Exhibit No. 32	<i>Excluded</i>

**The following exhibits were offered and entered into the record by the Applicant on May 17, 2000:**

Exhibit No. 33	Landowners list with map of ownership
Exhibit No. 34	Lot map
Exhibit No. 35	HPA, issued January 3, 2000 (four pages)
Exhibit No. 36	Revised dock plan
Exhibit No. 37	Certification and transfer of Applicant status
Exhibit No. 38	Legal description

**The following exhibits were offered and entered into the record on May 24, 2000:**

Exhibit No. 39	Excerpt of Kroll map 421W
Exhibit No. 40	King County Notice of Application for Shoreline Substantial Development Permit, dated May 25, 1994.